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Nos. 90-6588 and 90-1205

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JAKE AYERS, JR., *et al.*,
Petitioners,

v.

RAY MABUS, GOVERNOR,
STATE OF MISSISSIPPI, *et al.*,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,

v.

RAY MABUS, GOVERNOR,
STATE OF MISSISSIPPI, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF JOSEPH A. CALIFANO, JR., MARY F. BERRY, ERNEST L. BOYER AND DAVID S. TATEL

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Joseph A. Califano, Jr., Mary F. Berry, Ernest L. Boyer, and David S. Tatel respectfully move for leave to file the attached brief *amici curiae*. In support of this motion, *amici* state as follows:

1. Movants have obtained the consent of counsel for the private plaintiffs, petitioners in No. 90-6588, to the filing of the attached brief. Moreover, the consent of the Solicitor General of the United States, petitioner in No. 90-1205, has been obtained. Counsel for Governor Ray Mabus and the other State of Mississippi respondents, however, refused to consent to the filing of the attached brief.

2. The private plaintiffs, in their petition in No. 90-6588, contend that the Mississippi officials have not fulfilled the remedial obligations imposed upon them by Title VI and its implementing regulations. Indeed, the private plaintiffs set forth as a separate question for review: "Whether the court of appeals erred by failing to apply a Title VI regulation [34 C.F.R. 100.3(b)(6)(i)] addressing defendants' remedial obligation * * * in a manner consistent with administrative standards * * *." This Court granted certiorari with respect to this question, in the form in which it was presented by the private plaintiffs.

3. The Title VI regulations of the Department of Education have been interpreted by the Amended Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education (hereinafter "the Criteria"), 43 Fed. Reg. 40780 (1977). The Criteria not only shed light on the proper interpretation of the Title VI regulations at issue, they also demonstrate that it is possible to develop workable desegregation remedies that are consistent with the principles set forth in *Green v. County School Board*, 391 U.S. 430 (1968), and *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971), and which reflect the important differences between higher education and elementary and secondary school systems.

4. Movants submit that their unique perspective on the Criteria will assist the Court in resolving this case. Between 1977 and 1979, the movants were responsible for

developing and implementing the Criteria. In carrying out these tasks, the movants consulted extensively with members of the higher education community. The movants thus not only are familiar with the process by which the Criteria were developed, they also have actual knowledge of the effect of the Criteria upon public colleges and universities.

For the foregoing reasons, *amici* submit that their brief provides an important perspective on relevant issues that differs from that of the parties. Movants respectfully request that their motion for leave to file a brief as *amici curiae* be granted.

Respectfully submitted,

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BRIEF *AMICI CURIAE* OF JOSEPH A. CALIFANO, JR., MARY F. BERRY, ERNEST L. BOYER AND DAVID S. TATEL

INTEREST OF *AMICI CURIAE*

Amici were the officials of the U.S. Department of Health, Education and Welfare ("HEW") who, in 1977, developed and issued the Amended Criteria Specifying Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education, 42 Fed. Reg. 40780

(1977) (hereinafter "the Criteria"). The Criteria were issued pursuant to an order of the United States District Court in *Adams v. Califano*, 430 F. Supp. 118 (D.D.C. 1977). They were designed to govern HEW's review of higher education desegregation plans submitted by six southern and border states: North Carolina, Georgia, Florida, Virginia, Oklahoma and Arkansas. On February 15, 1978, the Amended Criteria were reissued and made applicable to all states that once operated systems of higher education segregated by law. 43 Fed. Reg. 6658 (1978).

This *amicus* brief describes the Criteria and the principles upon which they were based. We prepared the brief because, although the parties will present the legal arguments relevant to defining the appropriate standard to govern the higher education desegregation process, the Criteria are also relevant because they demonstrate that it is possible to develop workable desegregation remedies that are consistent with the principles set forth in *Green v. County School Board*, 391 U.S. 430 (1968), and *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), and which both reflect the important differences between higher education and elementary and secondary school systems and are compatible with the independence and autonomy so important to the proper functioning of colleges and universities.

Joseph A. Califano, Jr. was Secretary of the U.S. Department of Health, Education and Welfare from 1977 to 1979. He is now a member of the New York law firm of Dewey Ballantine.

Dr. Mary F. Berry was Assistant Secretary for Education from 1977 to 1979. Prior to that, she served as Chancellor of the University of Colorado at Boulder, and she is currently a member of the Commission on Civil Rights and a professor of American Social Thought and History at the University of Pennsylvania.

Dr. Ernest L. Boyer was the U.S. Commissioner of Education from 1977 to 1979. Prior to becoming Com-

missioner, he served as Chancellor of the State University of New York. He is currently President of the Carnegie Foundation for the Advancement of Teaching.

David S. Tatel was Director of HEW's Office for Civil Rights from 1977 to 1979. He is now a member of the Washington, D.C. law firm of Hogan & Hartson.

SUMMARY OF ARGUMENT

As officials of HEW in 1977, we prepared the Amended Criteria Specifying Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education to guide the development of desegregation plans by southern and border states that once operated systems of higher education segregated by law. The Criteria reflect three fundamental principles. First, they are based on the principles set forth in *Green* and *Swann*, and they reflect the fundamental differences between higher education and elementary and secondary school systems. Second, the Criteria establish overall goals to measure the effectiveness of desegregation efforts, but in order to preserve the independence and autonomy of higher education, the states are left free to develop their own measures for accomplishing those goals. Goals established by the Criteria are flexible benchmarks, not quotas. And finally, the Criteria include several provisions designed to strengthen the historically black colleges in order to ensure that they are able to participate in the desegregation process and to avoid placing a disproportionate burden on black students, faculty and institutions.

We developed the Criteria through a process that included extensive consultation with the higher education community. They stand as an example of a workable desegregation remedy that is consistent with *Green* and *Swann*, and that takes account of the unique characteristics and autonomy of higher education.

ARGUMENT

I. BACKGROUND OF CRITERIA

In 1969 and 1970, the Office for Civil Rights ("OCR") of the U.S. Department of Health, Education and Welfare notified ten southern and border states that they were operating their systems of higher education in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Each state was requested to submit a desegregation plan. Several of the states submitted plans that OCR determined to be unacceptable, while other states submitted no plans at all. OCR, however, took no further action.

In February 1973, the U.S. District Court for the District of Columbia ordered HEW to take appropriate enforcement action pursuant to Title VI. *Adams v. Richardson*, 356 F. Supp. 92 (D.D.C.), *aff'd*, 480 F.2d 1159 (D.C. Cir. 1973). In response, OCR asked the states to submit revised plans, and in 1974 accepted the plans submitted by eight of the ten states. OCR determined that the plans of Mississippi and Louisiana were unacceptable and therefore referred the matters to the Department of Justice. The Department of Justice thereafter filed several lawsuits, one of which ultimately led to these proceedings.

On April 1, 1977, the U.S. District Court ruled that the 1974 plans had failed to achieve significant desegregation and ordered HEW to develop and issue criteria to guide the states in the development of revised desegregation plans. 430 F. Supp. 118. It was in response to this order that *amici* developed the Criteria and published them in the Federal Register on August 11, 1977. *Id.* The Criteria were designed to govern OCR's review of revised desegregation plans that the states of North Carolina, Virginia, Florida, Georgia, Arkansas and Oklahoma were required to submit within 90 days. On February 15, 1978, the Criteria were reissued and made applicable to all states that operated higher educa-

tion systems once segregated by law. 43 Fed. Reg. 6658 (1978).

II. PRINCIPLES UNDERLYING THE DEVELOPMENT OF THE CRITERIA

Three fundamental principles guided our development of the Criteria: the higher education desegregation process is governed by the principles set forth in *Green* and *Swann*, but fundamental differences between higher education and elementary and secondary school systems must be taken into account in developing an appropriate remedy; the Criteria should establish overall goals to measure the effectiveness of desegregation efforts, but in order to preserve the independence and autonomy of higher education, the states should be free to develop their own measures for accomplishing those goals; and finally, the higher education desegregation process must be implemented so as to avoid placing a disproportionate burden on black students, faculty, and institutions. Each of these principles is discussed below.

A. The Higher Education Desegregation Process is Governed by the Principles Set Forth in *Green* and *Swann*, But Fundamental Differences Between Higher Education and Elementary and Secondary School Systems Must be Taken Into Account in Developing a Remedy

The Criteria are based on the principles set forth in *Green* and *Swann*. That is, they are based on the propositions that states must take affirmative steps to desegregate their formerly segregated systems of higher education and that the constitutional measure of the states' efforts is their effectiveness. 42 Fed. Reg. 40780 (1977). Our reasons for this position were two-fold: we read the decisions of the federal courts as requiring the application of *Green* and *Swann*, *e.g.*, *Norris v. State Council of Higher Educ.*, 327 F. Supp. 1368 (E.D. Va.), *aff'd per curiam*, 404 U.S. 907 (1971); *Lee v. Macon County Bd.*

of Educ., 267 F. Supp. 458 (M.D. Ala.), *aff'd*, 389 U.S. 215 (1967); *Geier v. Dunne*, 337 F. Supp. 573 (M.D. Tenn. 1972); and in our judgment, a policy of nondiscrimination in admitting students and employing faculty and staff, by itself, would not have been sufficient to eradicate the effects of the racially dual system of higher education.

In developing the Criteria, however, we fully understood that "* * * the nature of the remedial action required of a higher education system will differ from that required of a local education district." 42 Fed. Reg. at 40781. Elementary and secondary education is free and compulsory and students can be assigned to schools. None of this, of course, is true at the higher education level, and these differences were reflected in the Criteria, as were other major differences between elementary and secondary education and higher education:

> Besides being voluntary rather than compulsory, higher education operates on a statewide or regional basis, not local; there are no 'attendance zones' in higher education; higher education programs vary from institution to institution and are not uniform; students are free to leave the state or to attend private colleges in pursuit of a higher education.
>
> Furthermore, from state to state significant differences are to be found and must be taken into consideration. In some states [a] strong centralized 'system' exists including four year and two year institutions; in others, the four year and two year institutions report to separate boards; in yet others, each institution operates under its own independent board. While none of these differences relieves a state of its obligations under Title VI or its constitutional duties, they must be taken into account in fashioning an appropriate set of criteria * * *.
>
> Accordingly, while desegregation cases involving individual elementary and secondary school districts are a guide to a state's duty to take corrective action, they are not dispositive of the particular methods to

> be designed for the dismantling of a dual system of higher education, for the desegregation of a statewide system, for the removal of the vestiges of racial segregation, and for the correction of 'systemwide racial imbalance.'

Id. at 40781-82.

We also made it crystal clear that, in developing plans consistent with the Criteria, states were not expected to reduce their admissions standards:

> * * * under these criteria and the goals they set, all applicants must be able to compete successfully. States' efforts under these criteria need not and should not lead to lowering academic standards. States may need to innovate in seeking out talented students who will profit from higher education. They may need to broaden definitions of potential; to discount the effects of early disadvantage on the development of academic competence; and to broaden the talents measured in admission tests. But new and different yardsticks for measuring potential are not lower standards. They can be more valid measures of true potential and talent. Taken as a whole, these criteria seek to preserve and protect academic standards of excellence.

Id. at 40781.

In order to ensure that the Criteria reflected the unique characteristics of higher education and were educationally sound, Secretary Califano directed that they be developed by an interdepartmental task force that included among its members *amici* Boyer, Berry and Tatel. The task force conferred with representatives of all six states, individually and as a group. It also consulted with the leadership of the country's historically black colleges. Two panels of nationally recognized educators met for two half-day sessions to advise the task force.

B. The Criteria Should Establish Overall Goals to Measure the Effectiveness of Desegregation Efforts, But In Order to Preserve the Independence and Autonomy of Higher Education, The States Should Be Free to Develop Their Own Measures For Accomplishing Those Goals

In addition to responding to the nature of higher education and to its differences from elementary and secondary school systems, we designed the Criteria to be responsive to a major concern of southern higher education leaders. When we came into office and began our meetings with them to develop these Criteria, they told us that under the prior administration, the Office for Civil Rights had been entirely too intrusive. They told us that OCR had been telling them where to recruit, how often to recruit, and even who to recruit. They pleaded with us to draft criteria that set clear and measurable objectives for the desegregation process, and then to stand back and allow the colleges and universities themselves to develop the means by which they would attain the standard.

For this reason, the Criteria contain numerical goals and timetables. As we said in the introduction of the Criteria:

> The goals are established as indices by which to measure progress toward the objective of eliminating the effects of unconstitutional de jure racial segregation and of providing equal educational opportunity for all citizens of these states. They are benchmarks and provide the states the clear and specific guidance called for by the Court.

Id. at 40781. At the same time, we emphasized that the goals are not quotas:

> These goals are not quotas. The Department is opposed to arbitrary quotas. Failure to achieve a goal is not sufficient evidence, standing alone, to establish a violation of Title VI. In addition, the Office for Civil Rights upon a showing of exceptional hard-

ship or special circumstances by a state, may modify the goals and timetables.

Id.

C. The Higher Education Desegregation Process Must Be Implemented So As To Avoid Placing A Disproportionate Burden on Black Students, Faculty, and Institutions

The Court of Appeals directed that the Criteria take "into account the special problems of minority students and of Black colleges. . . . [T]hese Black institutions currently fulfill a crucial need and will continue to play an important role in Black higher education." *Adams v. Richardson*, 480 F.2d at 1164-65.

The District Court was even more specific. It stated:

> The process of desegregation must not place a greater burden on Black institutions or Black students' opportunity to receive a quality public higher education. The desegregation process should take into account the unequal status of the Black colleges and the real danger that desegregation will diminish higher education opportunities for Blacks. Without suggesting the answer to this complex problem, it is the responsibility of HEW to devise criteria for higher education desegregation plans which will take into account the unique importance of Black colleges and at the same time comply with the Congressional mandate.

430 F. Supp. at 120 (footnote omitted).

We took these directives into account as we drafted the Criteria. We made it clear, however, that we did not interpret the directives of the courts to mean that "the traditionally black institutions are exempt from the Constitution or the requirements of Title VI." 42 Fed. Reg. at 40782. Instead, we stated:

> . . . traditionally black and traditionally white institutions are subject to the same constitutional and

> congressional mandate to provide an education to all citizens without discrimination or segregation. White and black institutions are to function as part of a unitary system free of the vestiges of state imposed racial segregation. However, as the Court has instructed, the transition to a unitary system must not be accomplished by placing a disproportionate burden upon black students, faculty, or institutions or by reducing the educational opportunities currently available to blacks.

Id.

III. DESCRIPTION OF THE CRITERIA

The Criteria contain four sections, relating to dismantling the structure of the dual system (Section I), desegregation of student enrollment (Section II), desegregation of faculty, administrative staffs, non-academic personnel and governing boards and staff (Section III), and submission of plans and monitoring (Section IV). Each section includes a series of goals or commitments which the states are asked to incorporate in their desegregation plans. The Criteria also call for the states to commit themselves to a series of measures to accomplish the goals, but in order to avoid unnecessary OCR intrusion into the independence and autonomy of higher education, the Criteria specify that the states are to develop the measures and submit them to OCR as a supplement to their plans. Measures could be rejected by OCR only if they "offered no reasonable possibility of achieving the goals." *See e.g.*, Criteria § I.H.

A. Disestablishment of the Structure of the Dual System

The first section of the Criteria calls for the states to commit themselves to the goal of "organizing and operating the system and institutions of higher education in a manner that promises realistically to overcome the effects of past discrimination and to disestablish the dual sys-

tem and which assures that students will be attracted to each institution on the basis of educational programs and opportunities, uninhibited by past practices of segregation." Criteria § I. To accomplish this, the Criteria ask the states to define the missions of their institutions in non-racial terms. Criteria § I.A.

Once the states have adopted non-racial mission statements for each of their institutions, the Criteria call for them to take a number of steps to strengthen historically black institutions and to eliminate the vestiges of past segregation. For example, the Criteria call for the states to commit themselves to ensuring that historically black institutions will have programs and resources which are "at least comparable to those at traditionally white institutions having similar missions." Criteria § I.B.1. The states also were asked to take specific steps to "eliminate educationally unnecessary program duplication among traditionally black and traditionally white institutions in the same service area." Criteria § I.C. This criterion, which specifically exempted "core curricula," was designed to eliminate one of the primary vestiges of the *de jure* system of higher education: the extensive duplication of programs between historically white and historically black institutions in the same service area. This duplication lay at the heart of the *de jure* system and was one of the primary reasons why historically black and historically white institutions remained racially identifiable.

In order to further strengthen the historically black institutions, the states were asked to commit themselves to giving "priority consideration" to placing new undergraduate, graduate and professional programs at traditionally black institutions, "consistent with their missions." Criteria § I.D. Such programs would help to strengthen historically black institutions and give them the ability to attract white students. And finally, the Criteria called for each state to commit itself to "with-

hold approval of any changes in the operation of the state system or of any institutions that may have the effect of thwarting the achievement of its desegregation goals." Criteria § I.E.

We emphasize that the strengthening of the historically black institutions was sought as a means of achieving desegregation and enhancing educational and employment opportunities for black students. It was not intended to preserve particular institutions.

B. Desegregation of Student Enrollment

This section of the Criteria calls for the desegregation plan to "commit the state to the goal of assuring that the system as a whole and each institution within the system provide an equal educational opportunity, are open and accessible to all students, and operate without regard to race and on a desegregated basis." Criteria § II. In order to accomplish this goal, the Criteria asked the states to commit themselves to a series of specific goals designed to eliminate the disparity in the proportions of black and white high school graduates who enter state two-year and four-year undergraduate institutions, Criteria § II.A, reduce the gap between the percentages of black and white high school graduates in the state going on to traditionally white four-year institutions, Criteria § II.B, and eliminate the gap between the percentages of black and white college graduates going on to professional and graduate schools, Criteria § II.C. As indicated above, the Criteria made clear that these numerical commitments were goals only, not quotas, and the states were to develop their own recruiting, retention and other measures to reach the goals.

The Criteria also asked the states to commit themselves to reducing the disparity between the proportion of black and white students graduating from their two-year, four-year, and graduate institutions, Criteria § II.E, and to "expand mobility between two year and four year insti-

tutions as a means of meeting the goals set forth in these criteria." Criteria § II.F. The latter commitment was based on the fact that in each of the states covered by the Criteria, a disproportionate number of black students attended two-year institutions.

The Criteria also call for the adoption of desegregation goals for the black institutions. But in order to ensure that the desegregation process did not reduce educational opportunities for black students, the Criteria postponed the development of specific numerical goals for the traditionally black institutions until after significant steps had been taken to strengthen them and to increase the percentage of black students attending college generally and the traditionally white institutions in particular. Criteria § II.D.

C. Desegregation of Faculty, Administrative Staffs, Non-Academic Personnel and Governing Boards

The basic thrust of this section of the Criteria is for the states to commit themselves to the goal of "increasing the number and proportion of black employees, academic and non-academic, throughout the system and of increasing representation of black citizens among appointive positions on the governing boards of the state system and of individual institutions." Criteria § III. To achieve these goals, the Criteria call for the states to adopt a series of specific goals based on graduation rates of black students in appropriate disciplines or the availability of qualified black individuals residing in the relevant labor market areas. Criteria § III.A-D. These goals were to be achieved through measures adopted by the states which could include, among other activities, "employment programs providing centralized recruitment, vacancy and applicant listings; transfer options; faculty development programs permitting release time for black faculty to attain the terminal degree; and the interchange of faculty on a temporary or permanent basis among traditionally white and

traditionally black institutions within the state system." Criteria § III.F.

D. Submission of Plans and Monitoring

This section covers a variety of procedural matters, including timetables for the implementation of plans, Criteria § IV.A.1., and the requirement that each plan be signed by the governor, Criteria § IV.A.2. This section also includes procedures for annual reporting by states and for OCR review of state reports, Criteria § IV.D. Consistent with the basic principle that the goals set forth in the Criteria are flexible benchmarks and not quotas, this section gives states an opportunity to demonstrate "good cause" for failing to meet a goal. Criteria § IV.E.

CONCLUSION

We hope that the foregoing description of the Criteria and the principles upon which they were based will help the Court resolve the issues before it in this case. We would be pleased to respond to any specific questions the Court or the parties might have about the Criteria.

Respectfully submitted,

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